

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

AT&T Communications of California, Inc.
(U 5002 C), TCG Los Angeles, Inc. (U 5462 C),
TCG San Diego (U 5389 C) and TCG San Francisco
(U 5454C),

Complainants,

vs.

Verizon California Inc. (U 1002 C),

Defendant.

Case 04-08-026
(Filed August 19, 2004)

Telescape Communications, Inc. (U 6589 C),
Wholesale Airtime, Inc. (U 5751 C), and Blue Casa
Communications, LLC (U 6764 C),

Complainants,

vs.

Verizon California, Inc. (U 1002 C),

Defendant.

Case 04-09-001
(Filed September 1, 2004)

ACN Communication Services, Inc. (U 6342 C),
Covad Communications Co. (U 5752 C), and
Vycera Communications, Inc. (U 5477),

Complainants,

vs.

Verizon California Inc. (U 1002 C),

Case 04-09-010
(Filed September 7, 2004)

Defendant.

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OPINION ON CONSOLIDATED COMPLAINTS

I. Summary

Complainants in three consolidated complaints, (1) AT&T Communications of California, Inc., TCG Los Angeles, Inc., TCG San Diego, Inc. and TCG San Francisco, Inc. (AT&T); (2) Telescape Communications, Inc. (Telescape) and Wholesale Airtime, Inc. (Wholesale Airtime);¹ and (3) ACN Communications Services, Inc. (ACN),² allege in essence that their interconnection agreements with Verizon California, Inc. (Verizon) require Verizon to provide complainants unbundled access to the Local Switching and Common Transport network elements. These complainants, together with intervenor nii Communications, Inc (nii), as well as Intervenor Anew Telecommunications Corporation d/b/a Call America and Navigator Telecommunications, LLC (Call America and Navigator), filed summary judgment motions, and Verizon filed a cross motion for summary judgment. Intervenor MCI, Inc. (MCI) did not seek summary judgment, but opposed Verizon's motion and participated in the evidentiary hearings.

¹ Complainant Blue Casa Communications, LLC did not join in the motion for summary judgment and has moved that it be permitted to withdraw from the proceeding. We grant this motion.

² On September 22, 2004, Covad Communications Company filed a notice to withdraw from the complaints. On December 6, 2004, Vycera Communications, Inc. moved to withdraw from the complaint. We grant both Covad and Vycera's motions to withdraw from the complaint.

We hold that Verizon must allow Telescape, Wholesale Airtime, nii, MCI, Call America, and Navigator to purchase unbundled Local Switching and Common Transport network elements under the terms of their interconnection agreements, and may not decline to sell the unbundled network elements on the grounds that Verizon has changed certain hardware (i.e., replaced the circuit switch with a packet switch) used to provide the network elements. We so hold because the interconnection agreements address the functionality, and not the specific hardware, of the switch providing the Local Switching and Common Transport network elements. Verizon's obligation to continue to provide these network elements is also circumscribed by implementation of other decisions, such as the *Triennial Review Remand Order*,³ and related proceedings, as explained below.

Complainants filed these complaints before the Federal Communications Commission (FCC) issued the *Triennial Review Remand Order*. That order determined, among other things, that the incumbent local exchange carriers (ILECs) are not obligated to provide unbundled local switching pursuant to Section 251(c)(3) of the Federal Telecommunications Act.⁴ The FCC made the *Triennial Review Remand Order* effective as of March 11, 2005, with a 12-month transition period for certain customers. The relief granted in these cases is limited to the competitive local exchange carrier (CLEC) customer base for which Verizon is still required to provide unbundled Local Switching and Common

³ Order on Remand in *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 released February 4, 2005 (*Triennial Review Remand Order*).

⁴ The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*

Transport for a limited period, as this requirement is phased out under the *Triennial Review Remand Order* and related proceedings.

Furthermore, this order does not prohibit Verizon from deploying its new packet switches, nor does the order require Verizon to unbundle and provide the advanced service capabilities of its packet switches to complainants and intervenors. This order does require Verizon to comply with its interconnection agreements with complainants and intervenors and to provide the Local Switching and Common Transport network elements pursuant to those agreements.

We deny relief to complainant ACN, because ACN's interconnection agreement has expired. We also deny relief to Intervenor Fones4All for failing to prosecute or in anyway meet its burden of proof. After being granted intervention, Fones4All did not request specific relief or participate in any aspect of these cases, including the motions for summary judgment, the hearings, or post-hearing briefing. Finally, the relief ordered in this decision does not extend to AT&T because we grant AT&T's motion to withdraw its complaint which was filed after the Presiding Officer's Decision (POD) issued. However, as explained in Section VII below, we retain the discussion, findings and conclusions made by the POD in order to illuminate the entire controversy in this consolidated proceeding.

II. Procedural Background

A. Verizon's June 15, 2004 Letter

All complainants except ACN, and all intervenors except Fones4All, have valid interconnection agreements with Verizon. Pursuant to those agreements, Verizon currently provides complainants with unbundled Local Switching and Common Transport network elements. These two network elements are part of

the unbundled network elements platform (UNE-P) by which complainants and intervenors provide local service to many California consumers in Verizon's service territory.

These consolidated complaints arise from a June 15, 2004 Verizon letter to complainants and intervenors which stated that, beginning September 17, 2004, Verizon would convert its Class 5 circuit switches to packet switches in two of its five central offices. In so doing, Verizon would eliminate complainants' and intervenors' access to the Local Switching and Common Transport UNEs. Verizon has stated it can serve complainants and intervenors' customers through a resale platform, as opposed to the UNE-P.

B. The Consolidated Complaints

The three complaints filed in August and September 2004 were consolidated by a September 21, 2004 Administrative Law Judge (ALJ) Ruling because of common issues of law and fact. All three complaints allege that Verizon intends to eliminate the ability of other CLECs to purchase unbundled Local Switching and Common Transport network elements, alone and in combination with other network elements. The complaints also contend that Verizon's anticipated actions violate Verizon's interconnection agreements with complainants, as well as federal and state law.

C. The Order Maintaining the Status Quo

On August 19, 2004, AT&T filed, together with its complaint, an Emergency Motion for Order Maintaining the Status Quo Pending Resolution of the Complaint. On September 15, 2004, the Assigned Commissioner and ALJ granted AT&T's motion. (September 15 Ruling Maintaining the Status Quo.) The September 15 Ruling Maintaining the Status Quo, still in effect, made clear that it does not prohibit Verizon from deploying its new packet switches, nor

does the ruling require Verizon to unbundle and provide the advance service capabilities of its packet switches to AT&T. The ruling only requires Verizon to continue to provide AT&T access to unbundled Local Switching and Common Transport network elements under the terms of AT&T's interconnection agreement, which addresses functionality, and not specific hardware of the switch providing the Local Switching and Common Transport network elements.

The September 15 Ruling also maintains the status quo by extending the restraint to Verizon's performance under its California interconnection agreements with substantially similar access provision. It does so in order to maintain a level playing field and treat Verizon's interconnection agreements with all similarly situated California CLECs in the same way.

**D. September 17, 2004 Hearing and Decision
Confirming September 15 Ruling**

On September 16, 2004, Verizon filed a notice regarding compliance with the September 15 Ruling. In that notice, Verizon clearly informed the Commission for the first time that it was unable at that time to deploy the packet switches and continue to provide AT&T the access required by the ruling due to the lack of operational support system capabilities currently in place. Therefore, even though the September 15 Ruling did not prohibit Verizon from deploying its packet switch, Verizon stated it would not deploy packet switches in California while the ruling remained in place.

In light of the new information, the Assigned Commissioner and ALJ convened an emergency hearing on September 17, 2004 so that AT&T and Verizon could offer witnesses on the issue of the parties' respective harms, with a particular focus on end-user customers. The testimony at the hearing demonstrated that if the status quo were maintained, the current service to both AT&T and Verizon customers should not be disrupted.

On September 23, 2004, the Commission issued an interim order, Decision (D.) 04-09-056, which clarified and confirmed the September 15 Ruling. On that same day, the Commission issued D.04-09-057 which denied Verizon's appeal as to the categorization of this case and affirmed the categorization as "adjudicatory," as previously determined in the Instructions to Answer mailed to Verizon on August 24, 2004.

E. Subsequent Events

On October 21, 2004, the Assigned Commissioner and ALJ issued a Scoping Memo setting dates for the parties to file cross motions for summary judgment and reserving a hearing date if necessary. The following complainants or intervenors filed cross motions for summary judgment: AT&T; Telescape, Wholesale Airtime and nii; ACN; Call America and Navigator; and Verizon. MCI did not file a motion for summary judgment but opposed Verizon's summary judgment motion.

On December 20, 2004, the parties completed briefing on the cross motions for summary judgment. MCI alleged that hearings were necessary on four issues. The ALJ made no determination on the outcome of the cross motions but set hearings on the two issues set forth below in order to have a complete record so that the Commission could resolve the matter as soon as possible. The issues addressed in hearings were:

- What is the capability of the Nortel switch as deployed by Verizon with respect to performing the circuit switching function? Is the Nortel switch able to be modified to perform the circuit switching function and if so, what is the extent of the necessary modifications?
- From a technical perspective, is it feasible for Verizon to leave in place its existing circuit switch and also deploy the new Nortel switch?

Hearings were held on Friday, January 21 and Monday, January 24, 2005. Following the hearing and subsequent briefing, the FCC released the *Triennial Review Remand Order*. The parties in the instant case had the opportunity to address the effect, if any, this recent FCC order has on this case. The briefing was complete on March 7, 2005, on which date the cases were submitted.

We make our determination on the entire record, which includes the motions for summary judgment as well as the hearing transcript and post-hearing briefs. Complainants have the burden of proof in these complaint cases. The standard of proof is by a preponderance of the evidence. (See *Office of Ratepayer Advocates v. Pacific Bell Telephone Company*, D.01-08-067, 2001 Cal PUC LEXIS 517*8.)⁵

III. Circuit Switches vs. Packet Switches

Verizon currently provides complainants with unbundled Local Switching and Common Transport network elements through its circuit switches. Verizon claims that it is no longer required to do so when it deploys its packet switches.

Preliminarily, it is useful to describe the difference between circuit and packet switches. With a circuit switch, when person “A” calls person “B,” a dedicated circuit is created between these two points. This path is not shared by

⁵ On March 7, 2005, Verizon filed a conditional request that the Commission take administrative notice of Verizon’s March 4, 2005 brief filed in Washington State. Verizon states that MCI’s opening brief exceeded the ALJ’s ruling that the parties only discuss the effect of the *Triennial Review Remand Order* on this case, and also made reference to a recent decision from the Washington State Public Utilities Commission. We deny Verizon’s motion to strike MCI’s brief, but take notice (under Rule 73 of our Rules of Practice and Procedure) of Verizon’s March 4, 2005 motion for reconsideration of the Washington State Public Utilities Commission decision. In granting this motion, we recognize that Verizon filed this document, but make no findings or conclusions about the veracity of its representations.

anyone else while the call takes place. A packet switch, in contrast, is more like a freeway, on which multiple vehicles with differing originations and destinations share the same path. A packet switch is more efficient than a circuit switch because calls and other data are packaged (i.e., digitized and packetized), sent through a shared network, and reassembled at their respective destinations.

Packet technology is not new. It was first deployed over 15 years ago, replacing high-capacity telecommunications circuits, and is currently used by carriers to route long-distance traffic. The technology has evolved such that it can now be deployed into additional branches of the telecommunications network. The benefits from such deployment include many advanced service features, including broadband capabilities, as well as certain efficiencies.

IV. Parties' Positions

A. AT&T

AT&T states that its interconnection agreements with Verizon require Verizon to provide AT&T with access to Local Switching and Common Transport regardless of the switching technology deployed by Verizon. According to AT&T, the record established that it is technically feasible for Verizon to provide AT&T with access to Local Switching and Common Transport through the five central offices at issue regardless of how Verizon deploys its Nortel Succession switches (Nortel switches). AT&T views its complaint as a breach of contract case, and believes that Verizon's failure to provide these network elements by unilaterally discontinuing them after installing packet switches would breach AT&T's interconnection agreements, absent a valid amendment to them. According to AT&T, the hardware or technology used is irrelevant to Verizon's obligation to provide these elements,

and Verizon must provide these elements whether through its existing switches or a replacement switch.

B. Telescape, Wholesale Airtime, nii; ACN; Call America and Navigator

These CLECs, like AT&T, believe that their interconnection agreements with Verizon require Verizon to provide unbundled local switching, regardless of the technology Verizon uses to do so. Telescape, Call America, and Navigator also argue that the Commission may require Verizon to continue to provide unbundled local switching under its independent state authority to compel compliance with California's unbundling policy. ACN also requests that the Commission find that Verizon's conduct in refusing to provide unbundled switching to ACN is anticompetitive.

C. MCI

As stated above, MCI did not file a motion for summary judgment, but opposed Verizon's motion for summary judgment. Additionally, MCI requested and participated in hearings on the issues set forth above.

MCI believes that Verizon's motion should be denied because the law is not sufficiently settled for the Commission to grant judgment. MCI states that the FCC has declined to unbundle packet switches only for broadband, or advanced services, and has consistently required CLEC access to UNEs needed to provide narrowband services. MCI also states that, under its interconnection agreement with Verizon, Verizon is required to provide unbundled local switching regardless of the technology used.

With respect to the factual issues which were the subject of evidentiary hearings, MCI states that the Nortel switch as deployed by Verizon has circuit switching capabilities that could support UNE-P customers, because Verizon is deploying the switch with a re-deployed enhanced network module (ENET)

circuit switching fabric which can support UNE-P. MCI states that Verizon's decision to remove the UNE-P customers from the ENET is a policy choice, and not a technical decision. MCI also argues that Verizon tried but failed to create "pure" packet switching in order to eliminate competition. MCI believes that Verizon would need to make only straightforward modifications to the re-deployed ENET to support this traffic with circuit switching rather than packet switching. According to MCI, it is also technically feasible for Verizon to operate its circuit switch and the Nortel switch at the same time.

In sum, MCI maintains that Verizon has three technical alternatives to providing unbundled local switching: (1) use the ENET being re-deployed with the Nortel switch to support UNE-P customers; (2) use the packet switching fabric being deployed with the Nortel switch to support UNE-P customers; or (3) leave in place the existing DMS-100 circuit switch to support UNE-P customers, and operate the Nortel switch in parallel.

D. Verizon

Verizon states that federal law and the FCC have never required unbundled packet switching. Verizon similarly states that its interconnection agreements with the CLECs, adopted under and incorporating federal law, have never required unbundled packet switching and do not require it now. Verizon states that the interconnection agreements can only be interpreted against this backdrop of federal law, both because they are the means of effectuating federal law and because the agreements themselves specifically state that the duties they impose are congruent with the requirements of federal law.

Verizon also states that federal law prohibits this Commission from making a determination under its independent state authority that packet switches are a network element subject to unbundling. According to Verizon, the FCC's determination not to require the unbundling of packet switches

preempts inconsistent state regulation, and means that no such regulation is appropriate. Verizon also argues that the interconnection agreements at issue here explicitly restrict Verizon's unbundling obligations to those required by federal law, and federal law precludes the unbundling of packet switches. Therefore, according to Verizon, in the absence of any explicit agreement to unbundle packet switches, the Commission cannot interpret the interconnection agreements to impose such an unbundling requirement. Verizon further believes that its interconnection agreements do not contain unbundling obligations that exceed those set forth by the FCC.

Verizon states that although its Nortel switches have both packet and circuit switching capability, as currently configured, the switches are packet switches and cannot support UNE-P traffic in a TDM mode without being modified. Verizon elaborates that its Nortel switch is a packet switch, and the fact that it has continued to serve a few data lines which could not be supported by the packet switching fabric over the ENET does not alter this conclusion.

Verizon believes that modifications, or "operational workarounds" to perpetuate UNE-P, would be costly, time consuming, and present serious operational challenges. Therefore, Verizon believes making these modifications is not feasible.

Verizon first believes that such modifications would not be technically feasible because any switching overlay would be fraught with problems.⁶

⁶ According to Verizon, these problems include but are not limited to: (1) Nortel redesign of the complexes; (2) additional interface packets; (3) echo cancellers; (4) additional provisioning and engineering work to support the echo cancellers; (5) possible additional interworking SPMs; (6) modification of node and line provisioning data; (7) TDM remotes; (8) a transport solution to backhaul GR-303 DLC traffic, and (9) additional provisioning and translations for the GR-303 DLC lines.

Verizon further states that operational “workarounds” to perpetuate UNE-P would be costly. Verizon’s witness, Danny Peeler, is Nortel’s solution architect for the Nortel succession switches. Peeler states that he spoke to a Nortel director who does commercial costing and the director told Peeler the cost would be in the millions. Peeler also stated that making such modifications would take at least six months.

Verizon also states that duplicative deployment of both switches is not feasible from a business perspective, again because such deployment is costly and time consuming.

V. Applicable Law

Most of the interconnection agreements have provisions addressing how applicable law affects the parties’ rights and obligations under the agreements. Therefore, before addressing the specific interconnection agreements at issue, it is useful to set forth the applicable federal law regarding requirements to unbundle the local switching and packet switching network elements.

A. Network Elements

The Telecommunications Act of 1996 requires ILECs to provide “access to network elements on an unbundled basis.” (47 U.S.C. § 251(c)(3).) The term “network element” means “a facility or equipment used in the provision of a telecommunications service. This term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.” (47 U.S.C. § 153(29).)

The FCC has consistently maintained a broad definition of network elements subject to the 1996 Telecommunication Acts's unbundling requirement which is not limited to a particular piece of hardware:

“We reaffirm our previous interpretation of the definition of ‘network element’, set forth in Section 153(29) of the Act, as requiring incumbent LECs to make available to requesting carriers network elements that are capable of being used in the provision of a telecommunications service. Section 153(29) defines ‘network element’ as ‘a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions and capabilities that are provided by means of such facility or equipment...’ As an initial matter, we disagree with those commenters that continue to argue that ‘network elements’ can only be physical facilities or pieces of equipment and therefore cannot include mere features, functions, and capabilities of a physical facility or equipment, such as a portion of the available bandwidth of a loop. Several courts, including the Supreme Court, have previously considered and rejected this argument. Indeed, the Supreme Court stated that ‘[g]iven the breadth of [Congress’s network element] definition, it is impossible to credit the incumbents’ argument that a ‘network element’ must be part of the physical facilities and equipment used to provide local telephone service.’” (Citations omitted.)⁷

Verizon argues that determining what is a network element is essentially a two-part process. According to Verizon, once the FCC determines whether a particular facility or equipment should be unbundled, only then do the features and functions of the particular piece of equipment become available for

⁷ *In the Matter for Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338 et al., Further Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, FCC 03-36 (*Triennial Review Order*) released August 21, 2003 at ¶ 58.

unbundling purposes. Thus, according to Verizon, the features and functions of the circuit switch are subject to unbundling, but the features and functions of a packet switch are not, even though both pieces of hardware may be utilized to provide overlapping features or functions, in this case, local switching.

We disagree with Verizon's narrow reading of the definition of a network element tied to a particular piece of equipment. The authorities cited above define a network element as the facility or equipment used to provide telecommunications service, as well as the features, functions, and capabilities provided by means of such facility or equipment. Once a feature or function provided by a facility or piece of equipment is identified as a network element, that feature or function remains a network element regardless of the piece of equipment used to provide it.

This broader definition makes sense in the commercial setting, where parties to an interconnection agreement care about the nature of the unbundled services they are to receive. For example, a CLEC receiving the local switching does not care what piece of equipment is used to perform the local switching function, as long as the CLEC receives the agreed-upon function in a serviceable manner.

B. Local Switching

The FCC's *Local Competition Order*⁸ held that ILECs "must provide local switching as an unbundled network element." (See ¶ 410.) The *Triennial Review*

⁸ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 released August 8, 1996. (*Local Competition Order*.) (As stated above, the *Triennial Review Remand Order* addresses phasing out the above requirement.)

Remand Order issued earlier this year has rescinded this requirement with a 12-month transition period for certain customers.

C. Packet Switching

The FCC has declined to require unbundling of packet switching for advance services, but has not squarely addressed the issue of whether the ILECs can replace circuit switches with packet switches to avoid unbundling obligations.

Because of an insufficient record, in the *Local Competition Order*, the FCC did not finally decide the issue of whether to unbundled packet switches. The FCC stated it would continue to review and revise the rules.

Paragraph 427 of the *Local Competition Order* provides:

“At this time, we decline to find, as requested by AT&T and MCI, that incumbent LECs’ packet switches should be identified as network elements. Because so few parties commented on the packet switches in connection with Section 251(c)(3), *the record is insufficient for us to decide whether packet switches should be defined as a separate network element*. We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches. “(Emphasis added.)

In that order, the FCC addressed a limited request by several CLECs to unbundle *data switching* by packet switches. (See ¶ 407.) To the extent that the FCC focused on packet switches in the *Local Competition Order*, it focused on packet switches solely as a vehicle for providing advanced and data services.

In the *UNE Remand Order*,⁹ ¶ 304, the FCC addressed whether to unbundle packet switching. As a threshold matter, the FCC defined the functionality of the packet switching network element. The FCC first described packet-switched networks, where “messages between network users are divided into units, commonly referred to as packets, frames, or cells. These individual units are then routed between network users. The switches that provide this routing function are ‘packet switches,’ and the function of routing individual data units based on address or other routing information contained in the units is ‘packet switching.’” (¶ 302.)

The FCC’s packet switching definition focuses on the packet switching functionality used for providing data and advanced services, and not voice. The FCC describes a component of the packet switching functionality, the Digital Subscriber Line Access Multiplexer (DSLAM), and how the DSLAM, or a separate splitter, can split voice (low band) and data (high band) signals carried over a copper twisted pair. At that point, “the voice signal is transmitted toward a circuit switch, and the data from multiple lines is combined in packet or cell format and is transmitted to a packet switch...” (¶ 303.) Thus, the FCC’s definition distinguishes low-band voice from the packet switching definition.¹⁰

⁹ *In the Matter of Implementation of the Local Competition provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd. 3696, FCC 99-238 released November 5, 1999 (*UNE Remand Order*).

¹⁰ The FCC includes the DSLAM as part of the packet switching network element. However, the FCC also recognizes that a splitter separate from the DSLAM can separate low-band voice and high-band data signals, and that separate splitter is not included in the packet switching definition. Thus, we view the FCC’s packet switching definition as focused on data and advanced services.

Paragraph 304 of the *UNE Remand Order* then defines packet switching as follows:

“We define packet switching as the function of routing individual data units, or ‘packets,’ based on address or other routing information contained in the packets. The packet switching network element includes the necessary electronics (e.g. routers and DSLAMs [Digital Subscriber Line Access Multiplexer].) We find that packet switching qualifies as a network element because it includes ‘all features, functions and capabilities...sufficient...for transmission, routing or other provision of a telecommunications service.”

In the *UNE Remand Order*, the FCC declined to unbundle the packet switching functionality (with a limited exception not applicable in this case). Similar to the definition discussed above, the rationale for this decision focused on using the packet switching function for providing advanced services. Paragraph 306 of the *UNE Remand Order* states in pertinent part:

“...The record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – namely, medium and large businesses – and hence they cannot be said to be impaired in their ability to offer service, at least to these segments without access to the incumbent’s facilities. ...We conclude, however, that given the nascent nature of the advanced services marketplace, we will not order unbundling of the packet switching functionality as a general matter.” (Emphasis added.) (See generally ¶¶ 300-317.)

The *Triennial Review Order* also addresses the packet switching function. Because the FCC continues to apply the same definition of packet switching used in the *UNE Remand Order* (see ¶ 535), the FCC’s refusal to unbundle “packet switching as a stand-alone network element” again focuses on data and advanced services. (See ¶ 537; See also ¶ 539: “Thus, we decline to require

unbundling on a national basis for stand-alone packet switching because it is the type of equipment used in the delivery of broadband.”)

Verizon believes the orders above are broader in scope, and apply to both voice and advanced services. Verizon states the FCC clarified this point when it denied MCI’s (WorldCom’s) petitions for reconsideration and clarification on unbundling packet switching equipment. However, ¶ 288, note 833 of the *Triennial Review Order*, which Verizon cites, limits its discussion to advance services (i.e., DSL services). (“Because we decline to require unbundling of packet-switching equipment, we deny WorldCom’s petitions for reconsideration and clarification requesting that we unbundle packet-switching equipment, SDLAMs, and other equipment used to deliver DSL service.”)

Furthermore, neither the *Triennial Review Order*, nor other FCC precedent, addresses the question here: whether the ILECs can replace their circuit switches with packet switches and thereby avoid their obligations under interconnection agreements to provide the local switching functionality. Verizon, however, believes the FCC addressed this issue in footnote 1365 and ¶ 448 of the *Triennial Review Order*.

Footnote 1365 in the *Triennial Review Order* states in pertinent part:

“Moreover, the dissents fail to consider the incentives created by our decisions on packet switching and advanced services. Specifically, we no longer unbundled packet switching and the advanced networks used with such switching. This means that to the extent there are significant disincentives caused by unbundling of circuit switching, incumbents can avoid them by deploying more advanced packet switching. This would suggest that incumbents have every incentive to deploy these more advanced network, which is precisely the kind of facilities deployment we wish to encourage.”

In ¶ 448, the *Triennial Review Order* further states:

“...In fact, given that we do not require packet switches to be unbundled, there is little, if any basis for argument that our treatment of circuit switches gives LECs a disincentive to upgrade their switches.”

The above references refer to the deployment of new technology for the purpose of promoting the development of advanced services (i.e., broadband networks), rather than the replacement of existing switches. We do not read this language, primarily in a footnote, as constituting a holding that the ILECs can replace their circuit switches with packet switches and thereby avoid their obligations under the interconnection agreements to provide the local switching functionality. Presumably, had the FCC so intended, it would have rendered such a major policy decision explicitly and in more prominent, directive language. Moreover, the FCC has never prohibited Verizon from satisfying its obligations under interconnection agreements by means of a packet switch.

VI. The Interconnection Agreements

We now turn to the language of the interconnection agreements to determine whether these agreements release Verizon from its obligation to provide unbundled Local Switching and Common Transport network elements when it changes its hardware from a circuit to a packet switch. For this analysis, we turn to the specific language in the various interconnection agreements. We first analyze the AT&T interconnection agreements and then address the remaining agreements.

A. AT&T

1. Verizon's Obligation to Provide Local Switching and Common Transport Network Elements Under the Interconnection Agreements

Complainants in the AT&T case currently have two valid interconnection agreements with Verizon: (1) the AT&T Communications ICA; and (2) the TCG ICA.¹¹ The AT&T Communications ICA requires Verizon to provide AT&T Communications with access to UNEs identified in Attachment 2 to the agreement.¹² Attachment 2 to the AT&T Communications ICA lists and defines Local Switching and Common Transport network elements as two of the network elements to which Verizon must provide AT&T access. (See Sections 60 and 63 of Attachment 2, respectively.)

¹¹ On January 23, 1997, AT&T Communications entered into the *Interconnection, Resale and Unbundling Agreement between GTE California Incorporated, Contel of California, Inc. and AT&T Communications of California, Inc.* (AT&T Communications ICA). The Commission approved the arbitrated AT&T Communications ICA in D.97-01-022, 70 CPUC2d 609. In 1998, the TCG Companies adopted the terms of the arbitrated *Interconnection Agreement between MCImetro and GTE (TCG ICA)*. The Commission approved the TCG ICA in Resolution T-16185. Verizon is the successor in interest to GTE and, as such, assumed GTE's obligations under these agreements. Both agreements continue in effect on a month-to-month basis by mutual agreement until AT&T and Verizon enter into a new agreement under 47 U.S.C. § 252. Because the interconnection agreements are quite lengthy, we discuss only the most relevant provisions in this order.

¹² See General Terms and Conditions Section 29 and 30. Specifically, Section 29, Introduction, provides that "This Part II sets forth the unbundled Network Elements that [Verizon] agrees to offer AT&T in accordance with its obligations under Section 251(c)(3) of the Act and 47 CFR 51.307 to 51.321 of the FCC Rules. The specific terms and conditions that apply to the unbundled Network Elements are described below and in Attachment 2. Prices for Network Elements are set forth in Part V and Attachment 14 of this Agreement."

Attachment 2, § 60 to the AT&T Communications ICA defines Local Switching as “the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk. Such functionality shall include *all of the features, functions, and capabilities* of the [Verizon] switch including but not limited to” (Italics added.)

The AT&T Communications ICA definition of Local Switching speaks in terms of “functionality,” e.g., the functional means to accomplish the task of Local Switching. Local Switching is not defined in terms of the underlying technology used to “connect the appropriate originating lines or trunks...to a desired terminating line or trunk.” Nowhere does the ICA state that Verizon’s obligations to provide Local Switching are limited by the type of technology used to provide it. Additionally, Verizon does not dispute that the packet switch it anticipates deploying can “connect the appropriate originating lines ... wired to the Main Distribution Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk.”¹³

Attachment 2, § 63 to the AT&T Communications ICA defines Common Transport as “an interoffice transmission path between ... Network Elements that carries the traffic of more than one carrier and is not dedicated to a single carrier.” Nothing in the ICA defines Common Transport based on the technology used to provide it, nor does the ICA permit Verizon not to provide Common Transport based on the type of switching technology deployed.

¹³ AT&T’s Separate Statement of Fact 9.

Similarly, the TCG ICA requires Verizon to provide TCG Companies with access to unbundled Local Switching and Common Transport network elements.¹⁴ This agreement also speaks in terms of functionality, and provides that Verizon shall have the full burden of proving that access requested by TCG is not technically feasible. Article VI, §§ 7 and 8 of the TCG ICA define Local Switching and Common Transport respectively, in language similar to the AT&T Communications ICA.

Thus, we conclude that the interconnection agreement language above requires Verizon to provide AT&T with unbundled Local Switching and Common Transport network elements, regardless of the technology used. We next examine the sections of the interconnection agreements which Verizon believes relieve it of this obligation.

2. Verizon's Arguments

Verizon believes that several sections of the AT&T Communications ICA and the TCG ICA permit Verizon to unilaterally discontinue AT&T's access to the Local Switching and Common Transport network elements of the UNE-P. First, Verizon states that the interconnection agreements must be interpreted under the law existing at the time the interconnection agreements were entered into. Verizon argues that, as early as 1996, the FCC determined in the *Local Competition Order* that packet switches were not subject to unbundling. Verizon believes that the definition of "local switching" in the parties' interconnection

¹⁴ See Sections 23.2 and 23.5. Because the TCG Companies adopted the MCImetro ICA, the language of the agreement that refers to MCIm should be read to refer to the TCG Companies.

agreements tracks the definition of “Local Switching” in the FCC’s *Local Competition Order*, and does not include packet switching within its ambit.

As stated above, we disagree with Verizon. In 1996, because of an insufficient record, the FCC did not finally decide the issue of whether to unbundle packet switches in the *Local Competition Order*. The law at the time these interconnection agreements were entered into was unsettled as to whether packet switches were to be unbundled.

Verizon also argues that each of the interconnection agreements at issue in this case define “local switching” in a manner substantively identical to the FCC’s definition of “local circuit switching” in the *Triennial Review Order*, and that this definition therefore conclusively demonstrates that the agreements contemplate only the unbundling of circuit, and not packet switches. However, all of the underlying agreements at issue in this proceeding were executed prior to the date the FCC released the *Triennial Review Order* (August 21, 2003). Verizon’s argument applying a definition from an order that was not released when the underlying interconnection agreements were executed is not persuasive.

Next, Verizon states that its actions comply with the interconnection agreements because both the AT&T Communications and TCG ICAs expressly limit the network elements that must be unbundled to those offered “in accordance” with Verizon’s statutory obligations under § 251(c)(3) of the Act, and relevant FCC rules.¹⁵ Verizon believes that applicable federal law does not require unbundling of packet switches under any circumstances.

As stated above, we disagree with Verizon’s interpretation. At the time the agreements were entered into (i.e., 1997 and 1998), federal law was unsettled as to whether Verizon was required to unbundle packet switches under any circumstances, and federal law does not prohibit Verizon from so doing. Moreover, the sections cited by Verizon are general provisions requiring Verizon to perform its obligations under federal law, and in some cases in accordance both with federal law and the ICA. We read these general references to federal law at the time the interconnection agreements were entered into, and not to changes of law that may occur over the life of the ICA. More specific ICA provisions set forth the parties’ conduct under changed circumstances of fact or law.

¹⁵ Verizon cites, among other similar provisions, the AT&T ICA at 36, Part II: Unbundled Network Elements § 29 (Introduction) (“This Part [II] sets forth the unbundled Network Elements that [Verizon] agrees to offer to AT&T in accordance with its obligations under Section 251(c)(3) of the Act and 47 CFR 51.307 to 51.321 of the FCC rules”; *id.* At 36, Part II: Unbundled Network Elements § 30.1 (“[V]erizon will offer Network Elements to AT&T on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with this Agreement, the Telecommunications Act of 1996, and applicable (and in force) State, and FCC Rules and Regulations.”

Section 3.3 of the General Terms and Conditions in the AT&T Communications ICA addresses how a network change contemplated by Verizon should be handled.¹⁶ According to § 3.3, Verizon may unilaterally discontinue an unbundled network element, such as the Local Switching and Common Transport network elements, only after proper notice, “to the extent required by network changes or upgrades.” (Emphasis added.)

Verizon admits that it is technically feasible to provide AT&T (and other CLECs) with UNE-P through a packet switch, but will not do so because Verizon believes it is not legally obligated to do so. Verizon also argues that it is not technically feasible to reconfigure its network to provide for circuit switching because it would be too costly, time consuming, and challenging to go back now and reconfigure its network.

Verizon tried to install its Nortel switches as pure packet switches for the main purpose of “immunizing against UNE-P business erosion.”¹⁷ Verizon did not install a pure packet switch because its switch still contains the ENET, which is the TDM fabric used in circuit switching. According to Verizon, the ENET is not there for switching voice traffic, but has been retained as an interface with

¹⁶ “3.3 [Verizon] will not discontinue any unbundled Network Element, Ancillary Function or Combination thereof during the term of this Agreement without AT&T’s written consent which consent shall not be unreasonably withheld, except (1) to the extent required by network changes or upgrades, in which event [Verizon] will comply with network disclosure requirements stated in the Act and the FCC or the Commission as a result of remand or appeal of the FCC’s [*Local Competition Order*]. In the event such a final order allows but does not require discontinuance, [Verizon] shall make a proposal for AT&T’s approval, and if the parties are unable to agree, either Party may submit the matter to the Alternative Dispute Resolution procedures described in Attachment 1...” Section 2.1 of the TCG ICA contains a similar provision.

¹⁷ See Exhibit C501, Attachment 2, pp. 1-2 [May 5, 2004 letter.].

other legacy devices to provide alarm and monitoring functions and is slated for elimination in an upcoming Nortel release to provide greater efficiencies.

Verizon also argues that any modifications this will be costly and take at least six months to accomplish.

Verizon was aware of its obligations under the interconnection agreements to provide Local Switching and Common Transport when it installed its packet switches. It chose to ignore these obligations and specifically designed its network with the intent to eliminate UNE-P. Verizon is not relieved of its obligation under the AT&T interconnection agreements to provide access to these network elements because modifications may be time consuming and costly, especially under these circumstances.¹⁸

Section 3.3 also provides that, (a) in the event a final order by the court or the FCC allows but does not require discontinuance of an unbundled network element, the parties must try to reach agreement, and if unsuccessful, (b) either party may submit the matter to alternative dispute resolution. Thus, assuming for the sake of argument that, subsequent to the *Local Competition Order*, the FCC determined that Verizon was not required to unbundle packet switches under any circumstances, Verizon would still have to follow these change of law provisions and could not unilaterally discontinue providing the Local Switching and Common Transport network elements to AT&T. These change of law provisions are as follows: If a change of law materially affects any material term, the parties, after proper notice, may renegotiate in good faith mutually

¹⁸ Verizon's cost estimates are general observations at best. Peeler states he obtained his cost estimate by speaking with a Nortel director with costing experience, but did not give specifics of the cost estimates (other than they were in the millions) in order for other parties or the Commission to determine the basis for the costs.

acceptable new terms. If such terms are not renegotiated within 90 days after such notice, the dispute then proceeds to alternative dispute resolution.¹⁹

B. Other CLEC Interconnection Agreements

Other CLECs' interconnection agreements also require Verizon to provide unbundled local switching. Telescope Communications and Wholesale Airtime, Inc. have each adopted the existing ICA between Verizon and Pac-West Telecomm, Inc. (Telescope/Wholesale Airtime ICA).²⁰ nii Communications, Inc. adopted the existing agreement between Verizon and Rural West-Western Rural Broadband, Inc.²¹ The pertinent language in these two agreements is identical.

Section 10 of the Network Elements Attachment of the Telescope/Wholesale Airtime ICA describes Verizon's obligations to provide unbundled local switching as follows:

“...Verizon shall provide [Telescope/Wholesale Airtime] with access to the local switching element and the tandem switching element in accordance with, but only to the extent required by, Applicable Law.

....

¹⁹ See Section 8.3 of the General Terms and Conditions of the AT&T Communications ICA and Section 12.1 of the TCG ICA.

²⁰ The Commission approved this agreement on May 22, 2003, in D.03-05-075 (2002 Cal. PUC LEXIS 945.) This agreement expires on May 29, 2006.

²¹ Resolution T-16761 approved the interconnection agreement between Verizon California Inc. and RuralWest-Western Rural Broadband, Inc. nii adopted this interconnection agreement by advice letter which became effective on October 19, 2003. The underlying Verizon/RuralWest interconnection agreement became effective on April 25, 2003, and remained in effect until April 22, 2005. nii states it has the option under 47 U.S.C. § 252(i) of adopting the interconnection agreement between Verizon California Inc. and Pac-West Telecomm.

“The unbundled Local Switching Element includes line side and trunk side facilities (e.g. line and trunk side Ports such as analog and ISDN line side Ports and DS1 trunk side Ports), plus the features, functions, and capabilities of the switch. It consists of the line-side Port (including connection between a Loop termination and a switch line card, telephone number assignment, basic intercept, one primary directory listing, presubscription, and access to 911, operator services, and directory assistance), line and line group features (including all vertical features and line blocking options that the switch and its associated deployed switch software is capable of providing and are currently offered to Verizon’s local exchange Customers), usage (including the connection of lines to lines, lines to trunks, trunks to lines, and trunks to trunks), and trunk features (including the connection between the trunk termination and the trunk card).”

As in the interconnection agreements discussed above, nothing in this interconnection agreement limits Verizon’s obligation to provide local switching a specific type of hardware. Changing hardware from a circuit to a packet switch does not affect that obligation.

Verizon argues that other portions of the interconnection agreements relieve it from the requirement of providing local switching to these CLECs. As an example, Verizon cites § 1.1 of the Network Elements Attachment of the Telescape/Wholesale Airtime ICA, which Verizon states limits its obligation to provide unbundled UNE to those required by applicable law.

“...notwithstanding any other provision of this Agreement, Verizon shall be obligated to provide unbundled Network Elements (UNEs) and Combinations to [Telescape/Wholesale Airtime] only to the extent required by Applicable Law and may decline to provide UNEs or Combinations to [Telescape/Wholesale Airtime] to the extent

that provision of such UNEs or Combinations is not required by Applicable Law.” (Emphasis added.)²²

Other sections of the interconnection agreement contain similar language. Based on our discussion of federal law above, Verizon has not been relieved of its obligation to provide the Local Switching and Common Transport network elements because it changes its switch from a circuit to a packet switch.

The interconnection agreements of MCI,²³ Call America²⁴ and Navigator²⁵ contain identical language with the Telescope/Wholesale Airtime, and nii interconnection agreements. Our conclusion regarding these interconnection agreements is the same.

²² Other sections of this interconnection agreement contain similar language. (See, e.g., Network Elements Attachment § 2, § 10.1.)

²³ On February 28, 2003, MCI opted into the interconnection agreement between ICG Telecom Group, Inc. and Verizon California Inc. f/k/a GTC California Incorporated for the State of California. The underlying interconnection agreement was approved by the Commission on February 7, 2002 in Resolution T-16631. According to § 2.1, the initial term of the agreement is until June 20, 2004, and thereafter the agreement continues in effect until terminated as provided by the agreement. Neither MCI nor Verizon states that the underlying agreement has terminated.

²⁴ On February 18, 2003, Call America filed an advice letter with the Commission adopting the interconnection agreement between Z-Tel and Verizon, which underlying agreement was approved by the Commission on September 20, 2001 in Resolution T-16574. Pursuant to § 2.1 of this agreement, the initial term of the agreement ended June 8, 2003 and thereafter continues in full force and effect until cancelled or terminated by the parties. Neither party has indicated that it has cancelled or terminated the agreement.

²⁵ On July 17, 2002, the Commission approved the interconnection agreement between Navigator and Verizon in Resolution T-16672. Pursuant to §2.1 of this agreement, the initial term of the agreement ended February 19, 2004 and thereafter continues in full force and effect until cancelled or terminated by the parties. Neither party has indicated that it has cancelled or terminated the agreement.

ACN adopted the interconnection agreement between Verizon and Sprint Communications, L.P. pursuant to an advice letter dated July 31, 2003. The Commission approved the underlying interconnection agreement in D.01-03-044, 2001 Cal PUC LEXIS 191. This agreement expired on April 15, 2004. (See § 5 of the Verizon/Sprint Interconnection Agreement.) Although ACN states that it is involved in the Commission's interconnection arbitration proceeding, Application 04-03-014, this proceeding is not the vehicle by which ACN can extend the Sprint interconnection agreement beyond its termination date. Because the underlying interconnection agreement is not currently in force, we deny ACN its requested relief.

Although Fones4All intervened in these cases, it has not otherwise requested relief or participated in this proceeding. Fones4All failed to file a motion for summary judgment or respond to the other pleadings, failed to participate in the hearings and post-hearing briefing, and failed to provide a copy of its interconnection agreement, as the ALJ required.²⁶ We therefore hold that Fones4All has not met its burden of proof, and therefore deny it relief.

C. State Law Issues

Several CLECs argue that the Commission may require Verizon to continue to provide unbundled local switching under its independent state authority to compel compliance with California's unbundling policy. Because of our resolution in this case, we need not reach this issue.

²⁶ See October 8, 2004 Transcript at p. 25; see also March 30, 2005 ALJ Ruling.

VII. Appeal of Presiding Officer's Decision

On May 5, 2005, the Presiding Officer's Decision (POD) in these consolidated cases issued. On June 3, 2005, Verizon filed an appeal of the POD alleging numerous factual and legal errors.²⁷ MCI and Call America and Navigator (jointly) filed an opposition to the appeal.

Additionally, on May 6, 2005, a day after the POD issued, AT&T filed a motion to withdraw its complaint with prejudice. A June 1, 2005 ALJ ruling requested further briefing on this motion. AT&T timely filed a supplement to its motion and Verizon and Call America and Navigator²⁸ (jointly) filed a timely response to AT&T's supplement. We address AT&T's motion and Verizon's appeal individually below.

²⁷ Together with its appeal, Verizon filed a motion for expedited Commission review of the POD on an ex parte basis. MCI and (jointly) Navigator, Telescape, and nii opposed Verizon's motion. Because this matter was actively litigated by both plaintiffs and defendant, we wish to have a complete and balanced record on which to make a determination on Verizon's appeal. We therefore deny Verizon's motion that we consider the appeal on an ex parte basis.

²⁸ Together with their response to AT&T's supplemental filing, Call America and Navigator moved pursuant to Rule 73 of the Commission's Rules of Practice and Procedure that the Commission take official notice of Verizon's Motion for Leave to Withdraw Petition for Arbitration As to Certain Parties filed December 2, 2004 in Application 04-03-014. We grant this motion, but, as we noted above with respect to Verizon's motion for official notice, we recognize that Verizon filed this document but make no findings or conclusions here about the veracity of its representations.

A. AT&T's Motion to Withdraw Its Complaint With Prejudice

1. AT&T's Supplemented Motion and Responses

AT&T's initial motion to withdraw its complaint with prejudice gave no justification. However, an ALJ ruling requested further briefing on the following points:

- The facts and circumstances justifying AT&T's motion;
- Whether any agreement, implicit or explicit, has been reached between AT&T and Verizon regarding the withdrawal and if so, the agreement's terms;
- How the request for withdrawal resolves the harm to the continuing public interest alleged in the complaint; and
- How the request for withdrawal is consistent with the rationale set forth in prior Commission precedent, i.e., *Re Southern California Gas Company*, 43 CPUC2d 639, and other Commission precedent.

In response, AT&T states that it seeks to withdraw its complaint with prejudice because it has resolved its dispute with Verizon by means of two agreements, a commercial agreement and an interconnection agreement amendment. According to AT&T, these agreements will insure that AT&T continues to obtain the facilities and features necessary to serve its local exchange customers even without access to the UNE-P, at specified rates. AT&T states that these two agreements enable it to continue to serve residential local exchange customers in Verizon's service territory, and to avoid the business uncertainty of wholesale prices set either through litigation or by regulation.

Supporting AT&T's motion, Verizon believes that granting the withdrawal is in the public interest because the settlement avoids the risk and expenses associated with further litigation, and because settlement should be encouraged

at every step of the proceeding. Verizon also believes dismissal is in accord with Commission precedent, because AT&T's reasons for withdrawal are business-related. According to Verizon, the business agreements entered into between itself and AT&T are valid and effective, and should be honored.

Call America and Navigator do not object to AT&T's motion, but argue that withdrawal of AT&T's complaint does not diminish their need for a Commission resolution of their disputes with Verizon. These CLECs state that because Verizon has not offered any alternative for them to consider, the Commission needs to act on the remaining cases so that Verizon does not unilaterally alter the terms of the CLECs' interconnection agreements.

2. Discussion

In *Re Southern California Gas Company*, 43 CPUC2d 639 (1992), the Commission determined that an applicant no longer had the right to withdraw its application, when the matter had been submitted to the Commission on the evidentiary record and a proposed decision had issued pursuant to Pub. Util. Code § 311(d). At this juncture in the proceeding, the Commission held that the ability of applicant to withdraw its application rests with the Commission's discretion. In exercising its discretion, the Commission balances "a general disposition to permit litigants to control their interaction with governmental bodies with the necessity that entities such as courts and the Commission advance the public business while disposing of private claims and petitions." 43 CPUC2d at 640.

"While earlier California cases suggested that litigants had this right, those cases were arrested by the decision of the Supreme Court in *Chadbourn v. Superior Court*, 60 Cal.2d 723, 731, n 5 (1964). In *Chadbourn* the court asserted its discretion to refuse to permit a dismissal where the case involved issues of substantial importance and would impinge upon the orderly development of the law. Accord, *Liberty Mutl. Ins. Co. v. Fales*, 8 Cal.3d 712, 716 (1973). In *Fales* the court again asserted its interest in protecting a capacity to address issues of continuing public interest. Not only do we take a similar view, but we find it consistent with unpublished Commission precedent." (*Id.*)

We agree with the concurrence in *Re Southern California Gas Company* that in absence of such a policy, “all manner of mischief may go unchecked. Parties would be free to engage our resources and put opponents or intervenors to considerable expense and no little risk only to moot the controversy in the event of an adverse proposed decision. Further, our ability to discharge our own public responsibilities could be thwarted, as is the case here, by the sudden removal of a vehicle which presents the occasion to answer certain vital questions of general interest.” (43 CPUC2d at 641.)

Here, AT&T made a motion to withdraw its complaint after the evidentiary record had been submitted and the POD had issued. Therefore, AT&T no longer has the right to withdraw this complaint; the Commission must exercise its discretion to permit AT&T to do so.²⁹

Although both the assigned Commissioner and ALJ encouraged the parties to settle this dispute at the outset of the case, the timing of this settlement is troubling. The parties and the Commission spent significant time and resources litigating this case, and the ALJ had issued her POD before AT&T filed its motion. The settling parties engaged the Commission’s resources and put the other parties and the Commission to considerable expense, only to resolve the disputes after they received a result that, but for an appeal, would have been a final decision adverse to one of the settling parties. Although the settlement may save the parties’ time and expense in the event of an appeal from the

²⁹ AT&T cites to other complainants in these consolidated complaints whose summary request to dismiss their complaints are granted by the POD. These requests were made much earlier in the litigation, before the evidentiary record closed and the POD was issued. In contrast, AT&T was the lead complainant in a consolidated complaint case and fully participated in developing the evidentiary record and the subsequent briefing.

Commission's final decision, it nonetheless has not saved significant resources in litigating this case before the Commission.

However, this is a breach of contract case, and the settlement between AT&T and Verizon resolves the contractual issues before this Commission. We accept AT&T's representation that the agreements allow AT&T to continue to provide service to its local exchange customers with adequate Verizon facilities at a sustainable wholesale rate. For this reason, withdrawal of the complaint serves the limited public interest with respect to AT&T and its customers.

Determining whether withdrawal is in the broader public interest at this late date is a closer question. The Commission relies upon adjudication cases to enunciate Commission policy on a case-by-case basis. This policy is useful not only to the specific parties to the litigation, but as well to similarly situated persons who may have filed their own complaints. Here, three similar complaints have been consolidated, and additional parties have intervened. Although each complainant or intervenor relies upon its own interconnection agreement, the record was developed as a whole, and the discussion, findings, and conclusions with respect to the AT&T complaint help illuminate the entire controversy.

Therefore, in exercising our discretion on AT&T's motion to withdraw its complaint, we grant AT&T's motion out of deference to the settlement between the parties. However, we will retain the discussion, findings and the conclusions made by the POD with respect to the complaint in order to illuminate the entire controversy in this consolidated proceeding. That complaint was fully litigated, in substance it continues to bear on the remaining cases before us, and the record of the proceeding should stand as submitted.

B. Verizon's Appeal

Based upon numerous alleged factual and legal errors, Verizon argues that the decision in the POD should be reversed, and that Verizon should be able to discontinue providing the remaining complainants unbundled access to the Local Switching and Common Transport network elements.

Verizon's appeal, for the most part, raises the same arguments it has made throughout the case. The POD addresses these arguments and that discussion need not be repeated here. We affirm the POD, but make some changes to improve the discussion and correct typographical errors. We also make the following observations on several points that Verizon raises.

Verizon argues that the decision "wreaks havoc" with its investment-backed expectations.³⁰ However, the decision only requires Verizon to continue to permit complainant and intervenor CLECs to purchase Local Switching and Common Transport network elements under the terms of their interconnection agreements. The order does not prohibit Verizon from deploying its new packet switches, nor does the order require Verizon to unbundle and provide the advanced service capabilities of its packet switches to the CLECs.

Verizon also argues that even if the FCC has not squarely addressed whether packet switches are subject to unbundling requirements for voice, the lack of an affirmative FCC ruling on this point is fatal to complainants and intervenors, because the FCC must expressly designate this service as a UNE for the CLECs to obtain access to it. However, complainants and intervenors are not seeking, nor does the decision require, unbundled access to packet switching. The decision requires Verizon to provide unbundled local switching for the

³⁰ Verizon appeal at p. 3.

limited term set forth in the decision by any technology it chooses. Thus, the absence of an FCC ruling on this issue is not fatal to the CLECs' case.

Verizon also claims that the CLECs' interconnection agreements indicate that it only must provide unbundled local switching from a circuit switch. However, as set forth in Section VI.B of the decision, under the interconnection agreements, Verizon's obligation to provide local switching is not limited to a specific type of hardware or technology. Verizon believes that the technology can be inferred in the interconnection agreements' definition because the definition is similar to a definition of local circuit switching contained in the *Triennial Review Order*. However, this order was not released when all the underlying ICAs at issue were finalized and approved.³¹

Finally, Verizon tried to install its Nortel switches as pure packet switches for the main purpose of "immunizing against UNE-P business erosion." (See Section VI.A.2.) However, Verizon was unable to install a pure packet switch in this case, and its switch still contains the ENET, which is the TDM fabric used in circuit switching. Thus, even if the legal analysis contained in the decision is incorrect, and Verizon used its new switch to provide local switching to the CLECs, the provision of this UNE would not be contrary to federal law as Verizon views it. This is so because the CLECs would be utilizing the circuit switching functionality that Verizon has retained on its switch.

As noted in the decision, Verizon states that although its Nortel switches have both packet and circuit capability, as currently configured, the switches are

³¹ Several of the CLECs adopted their underlying interconnection agreements after the issuance of the *Triennial Review Order*. However, the underlying interconnection agreements were all finalized and approved prior to the issuance of the *Triennial Review Order*. (See Section VI.B above.)

packet switches and cannot support UNE-P traffic in a TDM mode without being modified. Verizon argues that it is not technically feasible to reconfigure Verizon's network to provide for circuit switching because it would now be too costly, time consuming, and challenging. However, Verizon was aware of its obligations under the interconnection agreements to provide Local Switching and Common Transport when it installed its packet switches, yet it chose to ignore these obligations. Under these circumstances, Verizon is not relieved of its obligation to provide access to these network elements because modifications may be time consuming and costly.

Finally, Verizon generally asserts that it is legal error to rely upon a Nortel letter to Verizon confirming the understanding that Verizon's main purpose in attempting to create a pure packet switch is to immunize against UNEP business erosion. However, this Nortel letter, produced during discovery, was admitted into the record of this proceeding. Nortel's witness Peeler stated that he had no reason to question the letter's authenticity.³² Therefore, relying on this letter is not legal error. We therefore confirm the outcome of the POD.

VIII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the Presiding Officer in this case.

Findings of Fact

1. Complainants AT&T, Telescape, Wholesale Airtime, and Intervenor nii, MCI, Call America, and Navigator have valid interconnection agreements with Verizon.
2. Complainant ACN's interconnection agreement with Verizon has expired.

³² See Transcript at pp. 323-324.

3. Pursuant to the valid interconnection agreements, Verizon currently provides complainants and intervenors with unbundled Local Switching and Common Transport network elements. These two network elements are part of the unbundled network elements platform (UNE-P) by which complainants and intervenors provide local service to many California consumers in Verizon's service territory.

4. In a June 15, 2004 letter to complainants and intervenors, Verizon stated that, beginning September 17, 2004, it would convert its Class 5 circuit switches to packet switches in two of its five central offices, and that in so doing, it would eliminate complainants' and intervenors' access to the Local Switching and Common Transport unbundled network elements.

5. Verizon has stated that it can serve complainants and intervenors' customers through the resale platform, as opposed to the UNE-P.

6. On September 15, 2004, the Assigned Commissioner and ALJ issued a September 15 Ruling Maintaining the Status Quo requiring Verizon to continue to provide AT&T and similarly situated CLECs access to unbundled Local Switching and Common Transport network elements under the terms of the interconnection agreements.

7. On September 23, 2004, the Commission issued an interim order, D.04-09-056, which clarified and confirmed the September 15 Ruling. On that same day, the Commission issued D.04-09-057 which denied Verizon's appeal as to the categorization of this case and affirmed the categorization as "adjudicatory."

8. The AT&T Communications ICA defines Local Switching as "the Network Element that provides the functionality required to connect the appropriate originating lines or trunks wired to the Main Distributing Frame (MDF) or Digital Signal Cross Connect (DSX) panel to a desired terminating line or trunk.

Such functionality shall include *all of the features, functions, and capabilities* of the [Verizon] switch including but not limited to”

9. The AT&T Communications ICA definition of Local Switching speaks in terms of “functionality,” e.g., the functional means to accomplish the task of Local Switching. Local Switching is not defined in terms of the underlying technology used to “connect the appropriate originating lines or trunks...to a desired terminating line or trunk.” Nowhere does the ICA state that Verizon’s obligations to provide Local Switching are limited by the type of technology used to provide it.

10. Attachment 2, § 63 to the AT&T Communications ICA defines Common Transport as “an interoffice transmission path between ... Network Elements that carries the traffic of more than one carrier and is not dedicated to a single carrier.” Nothing in the ICA defines Common Transport based on the technology used to provide it, nor does the ICA permit Verizon not to provide Common Transport based on the type of switching technology deployed.

11. The interconnection agreements of the other complainants and intervenors for whom we grant relief contain similar provisions with respect to unbundled local switching. Nothing in these interconnection agreements limits Verizon’s obligation to provide local switching to the type of hardware used.

12. All of the underlying interconnection agreements at issue in this proceeding were executed prior to the date the FCC released the *Triennial Review Order* (August 21, 2003).

13. Verizon admits that it is technically feasible to provide AT&T (and other CLECs) with UNE-P through a packet switch, but will not do so because Verizon believes it is not legally obligated to do so.

14. Verizon tried to install its Nortel switches as pure packet switches for the main purpose of “immunizing against UNE-P business erosion.” Verizon did not install a pure packet switch because its switch still contains the ENET, which is the TDM fabric used in circuit switching. According to Verizon, the ENET is not there for switching voice traffic, but has been retained as an interface with other legacy devices to provide alarm and monitoring functions and is slated for elimination in an upcoming Nortel release to provide greater efficiencies.

15. Verizon was aware of its obligations under the interconnection agreements to provide Local Switching and Common Transport when it installed its packet switches. It chose to ignore these obligations and specifically designed its network with the intent to eliminate UNE-P.

16. The interconnection agreements of Telescape, Wholesale Airtime, and nii; MCI; Call America and Navigator require Verizon to provide the network elements only to the extent required by applicable law.

17. ACN’s interconnection agreement expired on April 15, 2004.

18. Other than requesting intervention, Fones4All has not otherwise requested relief or participated in this proceeding.

19. On May 6, 2005, AT&T filed a motion to withdraw its complaint with prejudice.

20. Withdrawal of AT&T’s complaint serves the limited public interest with respect to AT&T and its customer.

21. The parties and the Commission spent significant time and resources litigating this case, and the ALJ had issued her POD before AT&T filed its motion. The settling parties engaged the Commission’s resources and put the other parties and the Commission to considerable expense, only to resolve the disputes after they received a result that, but for an appeal, would have been a final decision adverse to one of the settling parties.

22. The Commission relies upon adjudication cases to enunciate Commission policy on a case-by-case basis. This policy is useful not only to the specific parties to the litigation, but to similarly situated persons who may or may not have filed their own complaint.

23. Although each complainant or intervenor relies upon its own interconnection agreement, the record was developed as a whole, and the discussion, findings and conclusions with respect to the AT&T complaint help illuminate the entire controversy.

Conclusions of Law

1. Complainants Blue Casa Communications, LLC, Covad Communications Company, and Vycera Communications, Inc.'s motions to withdraw from this proceeding should be granted.

2. Federal law defines a network element as the facility or equipment used to provide telecommunications service, as well as the features, functions, and capabilities provided by means of such facility or equipment. Once a feature or function provided by a facility or piece of equipment is identified as a network element, that feature or function remains a network element regardless of the piece of equipment used to provide it.

3. The FCC has declined to require unbundling of packet switches for advanced services, but has not squarely addressed the issue of whether the ILECs can replace circuit switches with packet switches to avoid unbundling obligations.

4. In 1997 and 1998, at the time the AT&T interconnection agreements were executed, the law was unsettled as to whether packet switches were to be unbundled.

5. Verizon's argument applying a definition to the interconnection agreements from an order that was not released when the underlying interconnection agreements were executed is not persuasive.

6. The AT&T Communications ICA, Part II: Unbundled Network Elements § 29 and § 30.1, among other sections, and similar sections in the TCG ICA, contain general references to federal law. We read these references to refer to the law at the time the interconnection agreements were entered into, and not to changes of law that may occur over the life of the ICA.

7. According to § 3.3 of the General Terms and conditions in the AT&T Communications ICA, and § 2.1 of the TCG ICA, Verizon may unilaterally discontinue an unbundled network element only after proper notice "to the extent required by network changes or upgrades."

8. Sections 3.3 and 2.1, discussed above, respectively provide that, (a) in the event a final order by the court or the FCC allows but does not require discontinuance of an unbundled network element, the parties must try to reach agreement, and if unsuccessful, (b) either party may submit the matter to alternative dispute resolution. Thus, assuming for the sake of argument that, subsequent to the *Local Competition Order*, the FCC determined that Verizon was not required to unbundle packet switches under any circumstances, Verizon would still have to follow these change of law provisions and could not unilaterally discontinue providing the Local Switching and Common Transport network elements to AT&T.

9. Verizon is not relieved of its obligation under the AT&T interconnection agreements to provide access to the Local Switching and Common Transport network elements because modifications to its new switch may be time consuming and costly, especially under the circumstances of this case.

10. Based on applicable law, Verizon is not relieved of its obligation to provide the unbundled local switching and common transport network elements to AT&T; Telescape, Wholesale Airtime, and nii; MCI; Call America and Navigator on the grounds that Verizon changed certain hardware (i.e., replaced the circuit switch with a packet switch) used to provide the network elements.

11. ACN's requested relief should be denied because its underlying interconnection agreement is not currently in force.

12. Fones4All should be denied relief for failure to prosecute.

13. Verizon's motion to strike MCI's February 28, 2005 brief should be denied.

14. Verizon's March 7, 2005 conditional request that the Commission take administrative notice and Call America and Navigator's June 22, 2005 request that the Commission take official notice should be granted. Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission should take notice of (a) Verizon's March 4, 2005 motion for reconsideration of the Washington State Public Utilities Commission, which was attached to Verizon's March 7, 2005 conditional request filed with the Commission; and (b) Verizon's Motion for Leave to Withdraw Petition for Arbitration as to certain parties, filed December 2, 2004, in A.04-03-014. In granting this motion, we recognize that Verizon filed these documents, but make no findings or conclusions about the veracity of the representations.

15. The ability for AT&T to withdraw its complaint at this juncture rests with the Commission's discretion.

16. In exercising our discretion on AT&T's motion to withdraw its complaint, AT&T's motion should be granted out of deference to the settlement between the parties. However, the discussion, findings and the conclusions made by the POD with respect to the complaint should be retained in order to illuminate the entire controversy in this consolidated proceeding.

17. This order should be effective immediately to ensure Verizon continues to comply with its interconnection agreements.

O R D E R

IT IS ORDERED that:

1. Verizon California Inc. (Verizon) must allow Complainants Telescope Communications, Inc and Wholesale Airtime, Inc.; Intervenor nii Communications, Inc.; Intervenor MCI, Inc.; and Intervenor Anew Telecommunications Corporation d/b/a Call America and Navigator Telecommunications, LLC to purchase unbundled Local Switching and Common Transport network elements under the terms of their interconnection agreements, and may not decline to sell the unbundled network elements on the grounds that Verizon has changed certain hardware (i.e., replaced the circuit switch with a packet switch) used to provide the network elements.
2. The relief granted in Ordering Paragraph 1 is limited to the competitive local exchange carrier base for which Verizon is still required to provide unbundled Local Switching and Common Transport network elements for a limited period, as this requirement is phased out under *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 released February 4, 2005 (*Triennial Review Remand Order*), and related proceedings.
3. Complainant ACN Communications Services, Inc. is denied relief because its interconnection agreement with Verizon has expired.
4. Intervenor Fones4All is denied relief for failure to prosecute.

5. Complainants Blue Casa Communications, LLC, Covad Communications Company, and Vycera Communications, Inc.'s motions to withdraw from this proceeding are granted.

6. Complainants, AT&T Communications of California, Inc., TCG Los Angeles, Inc, TCG San Diego and TCG San Francisco May 6, 2005 motion to withdraw their complaint with prejudice, made after issuance of the Presiding Officer's Decision (POD), is granted. However, the discussion, findings, and conclusions made by the POD shall be retained in order to illuminate the entire controversy in this consolidated proceeding.

7. Verizon's motion to strike MCI's February 28, 2005 brief is denied.

8. Verizon's March 7, 2005 conditional request that the Commission take administrative notice and Call America and Navigator's June 22, 2005 request that the Commission take official notice are granted. Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, the Commission takes notice of (a) Verizon's March 4, 2005 motion for reconsideration of the Washington State Public Utilities Commission, which was attached to Verizon's March 7, 2005 conditional request filed with the Commission; and (b) Verizon's Motion for Leave to Withdraw Petition for Arbitration as to certain parties, filed December 2, 2004 in Application 04-03-014. In granting these motions, we recognize that Verizon filed these documents with the Commission, but make no findings or conclusions about the veracity of the representations.

9. Case (C.) 04-08-026, C.04-09-001, and C.04-09-010 are closed.

This order is effective today.

Dated _____, at San Francisco, California.

**APPENDIX A
LIST OF APPEARANCES**

Cheryl L. Hamill
Senior Attorney
AT&T COMMUNICATIONS OF CALIFORNIA, INC.
222 W. ADAMS STREET, ROOM 15EA17
CHICAGO IL 60606-5307
chamill@att.com
For: AT&T Communications of Calif., Inc., TCGSF, TCGSD &
TCGLA

Rose Johnson
Attorney At Law
AT&T COMMUNICATIONS OF CALIFORNIA, INC.
795 FOLSOM STREET
SAN FRANCISCO CA 94107-1243
(415) 442-2603
rjohnson@att.com
For: AT&T

John Clark
Attorney At Law
GOODIN MACBRIDE SQUERI RITCHIE & DAY LLP
505 SANSOME STREET, 9TH FLOOR
SAN FRANCISCO CA 94111
For: Telscape Communications, Inc., BlueCasa Communications,
LLC, Wholesale Airtime, Inc., NII Communications

Glenn Stover
Attorney At Law
STOVER LAW
301 HOWARD STREET, SUITE 830
SAN FRANCISCO CA 94105
For: Call America

Glenn Stover
Attorney At Law
STOVER LAW
301 HOWARD STREET, SUITE 830
SAN FRANCISCO CA 94105
For: Navigator Telecommunications, LLC

Harry N. Malone
SWIDLER BERLIN SHEREEF FRIEDMAN,LLP
3000 K STREET, NW, SUITE 300
WASHINGTON DC 20007
For: ACN Communications Services, Inc.; Vycera
Communications, Covad Communications

Anita Taff-Rice
Attorney At Law
235 MONTGOMERY STREET, SUITE 920
SAN FRANCISCO CA 94104
(415) 699-7885
anitataffrice@earthlink.net
For: MCI

William B. Petersen
Attorney At Law
VERIZON
1717 ARCH STREET, 32ND FLOOR
PHILADELPHIA PA 19103
(215) 963-6506
william.b.petersen@verizon.com
For: Verizon

Elaine M. Duncan
Attorney At Law
VERIZON CALIFORNIA INC.
711 VAN NESS AVENUE, SUITE 300
SAN FRANCISCO CA 94102
For: Verizon

Jesus G. Roman
VERIZON CALIFORNIA, INC.
112 S. LAKEVIEW CANYON ROAD, CA501LB
THOUSAND OAKS CA 91362

Ross A. Buntrock
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
1401 EYE STREET, N.W. SEVENTH FLOOR
WASHINGTON DC 20005
For: Fones 4 All Corp.

William C. Harrelson
Attorney At Law
WORLD COM, INC.
201 SPEAR STREET, 9TH FLOOR
SAN FRANCISCO CA 94105
For: WORLD COM, INC.

(END OF APPENDIX A)